

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE:

LIN 06 147 50397

Office: NEBRASKA SERVICE CENTER

Date: JUN 20 2007

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadnick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a wood patternmaker pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.² As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. Counsel does not overcome the director's basis of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on March 7, 2006. The proffered wage as stated on the ETA Form 9089 is \$25,667 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ In the appellate brief, counsel acknowledges that the petition was filed under section 203(b)(2) of the Act, but asserts that the appeal relates to a denial of a petition to classify the beneficiary pursuant to "section 230(b)(3)" of the Act, presumed to mean section 203(b)(3) of the Act. The petition was filed under section 203(b)(2) of the Act and the director's decision cites that provision. Counsel provides no legal authority, and we know of none, that would allow the petitioner to seek a different classification on appeal.

² While the director's sole basis of denial is the petitioner's ability to pay the proffered wage, had the petitioner overcome that basis of denial, we would need to remand the matter for a determination as to whether the petitioner, who had only three years of experience as an engineer (the remaining experience was as a furniture maker), is a member of the professions *holding an advanced degree* as defined at 8 C.F.R. § 204.5(k)(2). A separate issue would be whether the position of "wood patternmaker," which requires a bachelor's degree and no experience or, in the alternative, five years of experience, requires an advanced degree professional. 8 C.F.R. § 204.5(k)(4).

On the petition, the petitioner claimed to have an establishment date in 1987, an unspecified gross annual income, an unspecified net income and two employees. In support of the petition, the petitioner submitted its 2005 Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation, unaudited financial statements for that year, a list of bank transactions for 2005, a Detailed Trial Balance for 2005 and the individual tax returns of the petitioner's sole proprietor for 2003 and 2004 when the petitioner was a sole proprietorship.

As stated above, the priority date in this matter is March 7, 2006. The petition and, in fact, the appeal were filed prior to the end of that year. Thus, tax returns would not be expected to be available for that year. The most recent documentation required under 8 C.F.R. § 204.5(g)(2) is the petitioner's 2005 tax return, which reflects the following information:

Gross income	\$282,024
Compensation of officers	\$48,000
Net income	\$1,767
Current assets	\$9,056
Current liabilities	\$5,706
Net current assets	\$3,350

The bank register reflects a balance of \$8,755.80 as of December 31, 2005. The individual income tax returns reflect the following information:

	2003	2004
Petitioner's gross receipts or sales (Schedule C)	\$365,223	\$335,043
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's net profit from business (Schedule C)	\$68,047	\$57,839
Proprietor's adjusted gross income (Form 1040)	\$157,756	\$86,843

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition.

On appeal, counsel asserts that the totality of circumstances, including the 2003 and 2004 tax returns, establish the petitioner's ability to pay the proffered wage pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel then relies on decisions by the Board of Alien Labor Certification Appeals (BALCA) for the proposition that a determination of ability to pay the proffered wage should take into account the assets of the petitioner's sole shareholder or sole proprietor. Counsel provides no legal authority, and we know of none, which provides that BALCA decisions are binding on this office. Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the Circuit Court of Appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987). The petitioner submits unaudited financial statements for January through

October 2006 and a sworn statement from its accountant projecting a net income of \$28,799.95 for 2006.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Counsel does not challenge the director's use of the petitioner's net income and net current assets as stated on the 2005 tax returns, both of which are insufficient to cover the proffered wage, but asserts that the director should have also considered other evidence.

The unaudited financial statements that the petitioner submitted with the petition and the new ones submitted on appeal, which reflect a net income of \$23,999.96 as of October 2006, are not as persuasive as audited statements. While the accountant purports to "certify" the accuracy of the information on appeal, he does not indicate that he performed an audit. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

While the petitioner submits a Detailed Trial Balance on appeal for January through October 2006, it does not submit a bank register or bank statements that might support the unaudited financial statement by demonstrating a monthly increase in cash consistent with the monthly proffered wage.

The petitioner also submits the sole shareholder's IRS Form 1040, U.S. Individual Income Tax Return for 2005 reflecting an adjusted gross income of \$85,858. In an affidavit, the shareholder asserts that his yearly salary from the petitioner is \$48,000, that he has always paid all of his expenses and that his business is increasing, requiring him to hire a full-time wood patternmaker rather than rely on subcontractors.

In general, we do not consider the assets of corporate shareholders. As of the priority date, the petitioner has operated as a corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Even sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner has not submitted any evidence regarding the expenses of himself and his three dependents. It is noted that his adjusted gross income steadily decreased in both 2004 and 2005.

Matter of Sonogawa, 12 I&N Dec. at 612, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2005 was an uncharacteristically unprofitable year for the petitioner. In fact, the petitioner's gross and net income both *decreased* from 2003 to 2004 and again from 2004 to 2005.⁴ We acknowledge that the unaudited financial statements for 2006 suggest a higher net income for that year, the year in which the priority date was established. The record, however, does not support the assertion by counsel and the petitioner that this higher net income is the result of a growing business. Significantly, the petitioner's gross income does not appear appreciably larger in comparison with the gross incomes listed in 2003, 2004 or 2005, even if the ten-month 2006 gross income is annualized. Rather, the higher net income appears to result from a reduced cost of sales in 2006 as compared with the cost of goods sold in 2005. The petitioner has not explained these significantly lower expenses in 2006. Given that the petitioner has not submitted audited financial statements for 2006, some explanation of the higher net income despite no significant increase in gross income is warranted.

Finally, the argument that the petitioner will use subcontracting costs saved by employing the beneficiary to pay the beneficiary is not persuasive. The petitioner's cost of labor expenses for 2005 and 2006 are lower than the proffered wage.

In summary, the petitioner has not demonstrated that it paid any wages to the beneficiary during 2005 or 2006. In 2005, the most recent data available to the director, the petitioner shows a net income and net current assets well below the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage as of the priority date.

⁴ The petitioner's net income decreased from 2004 to 2005 even when we combine the owner's wages in 2005 with the company's net income in that year given that the owner did not pay himself wages in 2003 or 2004.